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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/050,238	01/16/2002	Michael Paul Aronson	J6699/1(C)	6809

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EXAMINER

JIANG, SHAOJIA A

ART UNIT PAPER NUMBER

1617

DATE MAILED: 05/16/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/050,238	<b>Applicant(s)</b> ARONSON ET AL.	
	<b>Examiner</b> Shaojia A. Jiang	<b>Art Unit</b> 1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 February 2005.
- 2a) ☒ This action is FINAL.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,4-7,9-13 and 15-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 4-7, 9-13 and 15-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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### **DETAILED ACTION**

This Office Action is in response to Applicant's response (remarks/Arguments) filed February 3, 2005 wherein no amendment is filed, i.e., no claims are amended, cancelled, or newly submitted.

Currently, claims 1, 4-7, 9-13 and 15-17 are pending in this application and under examination on the merits.

Applicant's declarations of Michael P. Aronson (inventor) submitted February 3, 2005 under 37 CFR 1.132, is acknowledged and will be further discussed below.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 4-7, 9-13 and 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Glenn, Jr et al. (WO 9625144, equivalent to US 6,080,708) for same reasons of record stated in the Office Action dated November 4, 2004, and reiterated in full below.

Glenn, Jr et al. teaches the process for making a cleansing/moisturizing dual composition (a wet-skin treatment composition) which is an oil-in-water emulsion,

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wherein (a) an aqueous phase comprising water and dispersion stabilizer such as trihydroxystearin having the formula (i) (according to the formula therein, the molecular weight is deemed lower than 1000 Daltones and capable of forming a network in the aqueous phase), which is a fatty acid ester or C14-C22 acyl derivative as the instantly claimed, or silicas (see US 6,080,708, abstract, col.4 line 46 to col.6) or polymeric stablizers herein; (b) a structured oil phase (a lipid phase) comprising triglycerides and a structurant in about 75% by wt of that forms a stable 3-dimentional network comprising solid fatty esters , fatty alcohols, wax, petrolatum, with droplet size 0.1-100 microns, having viscosity within the instant claimed (see col.10-16). Glenn, Jr et al. also clearly teaches the stepwise of the process for making the composition therein (see col17 lines 25-65), including measuring skin retention and emulsions tests at 35<sup>0</sup>C (see col.16 line 40-col.17 line 23).The reference also teaches that antimicrobial agents (preservative) and EDTA (chelating agent) and an essential oil are used. See col. 9, line 49 - col.10, line 37', col. 17, lines 42-45. See instant claims 37-38.

Glenn, Jr et al. does not expressly disclose that the lipid phase therein is at temperature below 35<sup>0</sup>C, and the particular retention efficiency index, foam volume and irritation potential as claimed herein.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to obtain or determine the particular temperature herein, the particular retention efficiency index, foam volume and irritation potential in the known process of Glenn, Jr et al.

One having ordinary skill in the art at the time the invention was made would have been motivated to obtain or determine the particular temperature herein, the particular retention efficiency index, foam volume and irritation potential in the known process of Glenn, Jr et al., since the process for making the composition of Glenn, Jr et al., which is same or substantially similar to the instant composition, is known according to Glenn, Jr et al. The methods or process of obtaining or determining the particular temperature herein in the test, the particular retention efficiency index, foam volume and irritation potential are also known in the art and taught by Glenn, Jr et al.

Therefore, obtaining or determining the particular temperature herein, the particular retention efficiency index, foam volume and irritation potential based on the known methods or process and those taught by Glenn, Jr et al. is considered well within conventional skills in the art, involving merely routine skill in the art.

### ***Response to Argument***

Applicant's arguments and the declaration of Michael P. Aronson under 37 CFR 1.132 submitted February 3, 2005 with respect to the rejection made under 35 U.S.C. 103(a) as being unpatentable over Glenn, Jr et al. of record in the previous Office Action have been fully considered but are not deemed persuasive as to the nonobviousness of the claimed invention over the prior art as further discussed below.

Applicant asserts in the remarks and the declaration that "the Glenn reference is found in the aqueous phase and is used to stabilize components in the aqueous phase, the trihydroxystearin in the subject invention is found in the oil phase and, applicants believe, are actually believed responsible for a destabilizing effect which is in turn

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responsible for high oil retention on wet skin". Contrary to Applicant's assertion, the instant claim 1 clearly recites that the organic stabilizer such as fatty acid esters is also in the aqueous phase (see claim 1 (a) herein). Note that Glenn discloses that trihydroxystearin is a known fatty acid ester (see US 6,080,708: col.4 line 46-50 and its chemical formula at col.4 line 51 to col.5 line 23). Thus, the stabilizer of Glenn, trihydroxystearin, in the aqueous phase clearly reads on the claimed composition herein. Moreover, Glenn also discloses the stabilizers therein are crystalline or fatty soap water-insoluble wax-like substance (see US 6,080,708: col.4 line 49-50). Hence, the components in the aqueous phase taught by Glenn are not all water-soluble. Thus, trihydroxystearin or crystalline or fatty soap water-insoluble wax-like substance would present in the oil phase when the aqueous phase and oil phase mixed together to generated an oil-in-water emulsion.

Applicant's experimental results shown the differences of the emulsion properties between the claimed invention and Glenn's patent (see the photomicrographs in the declaration) have been fully considered but are ineffective to overcome the 103(a) rejections herein as to nonobviousness or unexpected results over the prior art. First, Applicant generated data, proffered to obviate prior art teachings, lack the probative force accorded data generated by independent, disinterested parties. It is well settled patent law "that it is not a difficult matter to carry out a process in such a fashion that it will not be successful and, therefore, the failures of experiments who have no interest in succeeding should not be accorded great weigh". See *In re Michalek*, 74 USPQ 108, at 109 citing *Bullard Company et al. Coe*, 147 F. 2d. 568, 64 USPQ 359.

Second, a single particular composition is employed in the compared testing herein. Thus, the evidence in the testing herein is not commensurate in scope with Glenn's patent and the claimed invention and does not demonstrate criticality of a claimed range of the ingredients in the prior art and the claimed composition.

Third, it is unclear as to under what temperature the testing was conducted. Therefore, the evidence presented in Applicant's declaration herein is not seen clear and convincing in support the nonobviousness of the instant claimed invention over the prior art and rebut the prima facie case herein.

In view of the rejections to the pending claims set forth above, no claims are allowed.

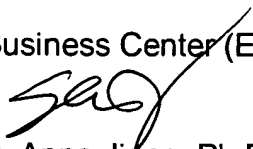
**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Jiang, whose telephone number is (571)272-0627. The examiner can normally be reached on Monday-Friday from 9:00 to 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan, Ph.D., can be reached on (571)272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



S. Anna Jiang, Ph.D.  
Primary Examiner  
Art Unit 1617  
May 9, 2005